

# In Defense of Judicial Populism: Lessons from Colombia

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In 2005, the Colombian Constitutional Court upheld an amendment allowing presidential reelection. An extremely popular President elected for the 2002-2006 period, Álvaro Uribe, was behind the reform. The Court's decision was highly controversial because one of the goals of the 1991 Constitution was to check the powers held by the Colombian President since 1886. For some, the Court's decision was a concession to a populist authoritarian President that had dangerously concentrated power in his hands.<sup>1</sup>) For a summary of the arguments opposing the constitutional reform see: Juan Sebastián Jiménez Herrera, 'La reelección de Uribe fue inconstitucional e ilegal' in: [El Espectador](#), 17 Abril 2015

Although the Court was not aggressive reviewing the amendment allowing reelection, in this piece I argue that the Court had other strategy to check Uribe's powers. The tribunal avoided direct clashes with an extremely popular President, and strengthened its political agenda to challenge the government. I also show that one of the ways to resist populist authoritarianism, as the Colombian case shows, is through the consolidation of a rival political project, led by the Constitutional Court, and with a populist undertone.

## I. Populism and contemporary politics

Populism has generally risen as a response to the conflictive conditions of the modern industrial world. In the early twentieth century, the clash between labor and capital—worried many thinkers and leaders around the world. Populist leaders appeared in this juncture highlighting how national reconstruction could avoid social disintegration. Populist nationalism became one of the antidotes against class struggle: leaders reimagined and rebuilt the political space around a set of common ideas about the nation to avoid conflicts.<sup>2</sup>) Perón's case in Argentina is one of the most remarkable examples of populism and nationalism in the first half of the twentieth century. See: Christian Buchricker, *Nacionalismo y peronismo. La Argentina en la crisis ideológica mundial (1927-1955)*, (Buenos Aires: Ed. Suramericana, 1987). Even currently, one of the main problems for contemporary populist leaders is the recasting of the nation in the face of diversity and pluralism.<sup>3</sup>) Ernesto Laclau, *La razón populista* (México: FCE 2003) 124-126.

For some political thinkers, populism is an inevitable feature of the political.<sup>4</sup>) Id at 9-11. Current societies are formed by many groups and individuals who have multiple political demands and that can be hardly articulated around a coherent agenda. Our identities are structured around class, sexual orientation, race, economic interests, religion, among others. In each realm our demands to the political body are shared only with partial groups of the body politic.<sup>5</sup>) Duncan Kennedy, Three globalizations of law and legal thought (1850-2000), in David Trubek & Alvaro Santos (eds.) *The new law and economic development. A critical Appraisal* (Cambridge: Cambridge University Press, 2006) 19. Political parties cannot articulate this plurality and populism represents the attempt to build an agenda encompassing the wide array of demands of our political communities; this agenda generally lacks 'coherence' and draws lines between those who are part of the nation's reconstruction and those who are not.<sup>6</sup>) On populists' exclusions, see: Jan-Werner Müller, *What is Populism?* (Philadelphia: University of Pennsylvania Press, 2016) 46-49. The intensity with which these lines are drawn, as well as the possibility of moving across the lines, determine whether a populist agenda drifts close or afar from authoritarianism.

The populist agenda of the Colombian Court in the 1990s focused in reconstructing a nation profoundly divided by armed conflict, social struggles, racism, narcoterrorism, political exclusion and urban violence. The Court's project revolved around the idea of *estado social de derecho* (ESD), which required an inclusive political agenda to seek redress for structural injustices that allegedly fueled violence. The tribunal argued that (constitutional) judges had to

be the leaders of this nation-building project. According to the Court, “the difficulties derived from the overwhelming strengthening of the executive power in the interventionist state and from the lack of leadership of legislatures have to be compensated, in a constitutional democracy, with the strengthening of the judiciary, which possesses the ability to control and defend the institutional order”.<sup>7)</sup>Corte Constitucional de Colombia, Sentencia T-406/1992, Magistrado Ponente Ciro Angarita Barón. In consequence, the Constitutional Court became the champion of this project that involved checking the activities of public authorities. One of the key moments in the construction of this agenda was the extension of the Colombian *amparo* –tutela– to include the judicial protection of social and economic rights.<sup>8)</sup>On the activity of the Colombian Court in this realm, see: David Landau, The reality of social rights enforcement, 53 *Harvard International Law Journal* 189 (2012). This agenda of national reconstruction around ESD made visible individuals and groups traditionally neglected.

In 2002, Colombians elected Álvaro Uribe as their President for the 2002-2006 term. His high popularity was a consequence of his promise of taking a more stringent approach on the State’s conflict against the guerrillas. Peace negotiations had failed under the previous government and armed groups like the FARC and the paramilitaries had grown stronger. Uribe’s credentials as a hardliner contributed to the public’s approval of an agenda based in reinforcing the presence of the national state in different regions that were the operations’ sites of “terrorists”.<sup>9)</sup>On the general stance of Uribe vis-à-vis guerrillas in his first presidential campaign and the political environment surrounding his election, see: José Baig, Uribe: ‘No puedo ofrecer milagros’ in: [BBCmuncdo.com](http://BBCmuncdo.com), 18 Mayo 2002. His strategy, labeled *seguridad democrática*, tried to reconstruct the nation under the notion of “security”, which was understood as a precondition for enjoying rights and liberties. Uribe and his supporters identified leftist guerrillas, their sympathizers, some human rights defenders and leftist politicians as the dissociative factors that hindered the reconstruction of the nation around the idea of *seguridad democrática*.<sup>10)</sup>On the criticisms against human rights NGOs see: La ira presidencial, en [Semana](http://Semana.com), 15 Septiembre 2003.

In contrast to the Court’s project of guaranteeing social rights as a means to reconstruct the idea of the nation, Uribe highlighted the need to strengthen the military and the presence of the nation state in the country side to provide security against “terrorism.” Security conditions, mainly provided by the armed forces, would have “spillover effects” over other rights and liberties.<sup>11)</sup>Presidencia de la República de Colombia-Ministerio de Defensa Nacional, *Política de Defensa y Seguridad Democrática* (2003).

## II. The threats against the Court

The antagonism between political projects was felt during Uribe’s first year, when the government raised doubts about the powers of the tribunal to review emergency decrees and published a draft of a constitutional reform limiting *acción the tutela*. Fernando Londoño, Minister of Interior, adopted an aggressive stance against the Court arguing that the tribunal did not have the powers to review the decree declaring emergencies. Londoño supported a textualist interpretation of the Constitution arguing that the Court did not have an explicit power to review the decree declaring the emergency. When the government declared a state of exception less than a week after Uribe took office,<sup>12)</sup>Pilar Lozano, Uribe decreta el estado de excepción en Colombia para frenar a las FARC en [El País](http://ElPaís.com), 13 agosto 2002. Londoño asserted that the government would not send the decree to the Court for its review. In his words, it “made no sense” that judges had the powers to “undermine the ability of society to react” against terrorists that threatened its existence.<sup>13)</sup>Id. The conflict ended when the Court finally reviewed the emergency declaration decree in a very lenient fashion.<sup>14)</sup>Corte Constitucional de Colombia, Sentencia C-802/2002, Magistrado Ponente Jaime Córdoba Triviño. Cfr. Amnesty International, expressed a deep concern about the effect of these measures on human rights. See: [Amnistía Internacional](http://Amnistía Internacional), *Colombia: ¿Seguridad a qué precio?* (December 2002). In this opportunity, the institution that had championed rights yielded to the government’s pressure, but the result was not only a victory for the government: the Court retained the powers to review the decrees but used those powers with extreme caution.<sup>15)</sup>Corte Constitucional de Colombia, Sentencia C-1040/2005, Magistrados Ponentes: Manuel José Cepeda, Rodrigo Escobar Gil, Marco Gerardo Monroy Cabra, Humberto Antonio Sierra Porto, Álvaro Tafur Galvis,

The second threat in Uribe's first year was an amendment draft that Londoño made public in 2003, where the scope of the *acción de tutela* was radically limited by excluding the justiciability of social and economic rights –the key tool in the construction of the political project of the Constitutional Court since its creation. The Court publicly reacted against the project, as well as the media and some progressive scholars.<sup>16)</sup>For a summary of the debate around the tutela reform see: La tutela en peligro in [Semana](#), 3 Agosto 2003. The reform did not reach Congress but, by 2003, it was clear that the Court was under pressure by a new government that openly sought to undermine the basis of the tribunal's political project.

Since Uribe's popularity only rose during his first term in office, the Court was in a complex situation: its populist agenda around ESD had garnered the support of progressive scholars, jurists, and middle classes.<sup>17)</sup>During Uribe's presidency, the lowest rate of approval of the Court, according to polls, was 53% and the highest was 69%. See: [Gallup Poll. Colombia](#) (2004) 112. Yet it was facing a set of threats from an extremely popular government that, if managed without tact, could seriously threaten the tribunal's existence. Against this backdrop, the Court had two options: clashing directly against the government or opening avenues that partially recognized criticisms but used them to strengthen the Court's position.

### III. Reelection and structural remedies. How to resist populist authoritarianism?

In 2004 and 2005 the Court handed down two of the most important decisions of its history. In 2004, it declared that the situation of internally displaced people (IDP) in Colombia was a humanitarian catastrophe and that the policies of the government were utterly ineffective. A year later it approved the constitutional amendment that allowed Uribe to run consecutively for a second term in office. These two decisions give us a clue to understand the strategy of the Court in dealing with Uribe's authoritarian populism and furthering the ESD project accepting some of the criticisms against the role of judges in adjudicating social and economic rights.

The 2004 decision involved a tutela raised by IDP who argued that the administrative agencies and policies established to deal with this phenomenon had not fulfilled their constitutional obligations to solve their humanitarian needs. From 2001, several decisions of the Court had addressed the effects of the problem but the opinions had not produced an effective government reaction. One of the main problems for the Court in ordering broad governmental action to attend IDP was budgetary constraints, a concern that was also the basis of the criticism against the social rights jurisprudence of the Court. Judges, said the critics, only ordered rights' protection but did not have in mind public policy prioritization and budgetary constraints.

In the 2004 opinion, the Court answered the latter criticism, furthered the project of protecting social rights, and turned the Court into a democratic forum where the executive branch had to discuss the policies and budgetary constraints that it faced and possible ways to solve them.<sup>18)</sup>Corte Constitucional de Colombia, Sentencia T-025/2004, Magistrado Ponente: Manuel José Cepeda. The decision acknowledged that the executive had restrictions. However, it also ordered the government to decide whether it was committed with the full protection of IDP rights or if it had to regress in their protection. In the words of Judge Cepeda who delivered the opinion, the "Court did not order to spend a penny" before the government had decided its commitment to IDP rights protection. The opinion, notwithstanding, was putting pressure upon the executive. The government had to establish the threshold for rights protection. A year later, when the government announced its commitment to fully protect the rights of IDP,<sup>19)</sup>The acceptance of the executive to a "maximalist" approach to rights can be explained because the populist political agenda of the Court also had domestic and international support. A decision to opt for a minimalist take on rights could have cost the government more outcry from human rights organizations. The Court triggered a set of structural remedies that involved the periodic discussion of the advances and setbacks of the public policy for attending IDP. In these discussions, the Court invited administrative agencies, members of the cabinet, NGO leaders, international institutions and scholars to discuss the problem and design public policy. The tribunal became

a forum for democratic experimentalism.<sup>20</sup>) See: Manuel José Cepeda-Espinoza, Transcript: Social and Economic Rights and the Constitutional Court, 89 *Texas Law Review* 1699, 1701, 1704 (2011).

With this story in mind, the 2005 decision in which the Court allowed Uribe's reelection acquires a new light. The tribunal ruled that the amendment was constitutional because the reform could be carried out by Congress insofar it did not affect one of the essential features of the charter that could only be altered by the people themselves. The Court also warned that the decision only approved reelection for two terms; eventually extending reelection for a third term could alter the essential structure of the Constitution.<sup>21</sup>) Corte Constitucional de Colombia, Sentencia C-141/2010, Magistrado Ponente: Humberto Antonio Sierra Porto.

If the reelection decision is not considered in isolation but against a broader political dispute as shown above, the opinion shows that the tribunal was cautious in clashing directly against one of the most popular governments in Colombian history –Uribe's favorable image among public opinion was around 70%. The Court approved reelection, but with the 2004 IDP decision it had tackled one of the most delicate problems surrounding the ensuing armed conflict that was plaguing the country during those years, especially after implementing Uribe's *seguridad democrática*. The tribunal decided to control Uribe's populism deepening the project of rights; the tribunal delivered one of its most important opinions ordering structural remedies and tried to reduce the risks of institutional reform against the Court. Direct opposition to reelection of an extremely popular President might have put additional pressure to the Court's project. Five years later the story changed and the Court struck down a statute calling for a referendum to reform the Constitution and permit Uribe run for a third term in office. But that is another story.

The story until 2005 in Colombia shows that, put under pressure by populist leaders, Courts might be in a better position to resist authoritarianism when they have a political project with wide public support. The likelihood of resisting authoritarian populism, in consequence, might be the politicization of Courts in the terms argued in this piece.

## References [ + ]

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